Guideline Sentencing Update

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Criminal History

OTHER SENTENCES OR CONVICTIONS

Supreme Court affirms use of prior uncounseled misdemeanor convictions in criminal history score. Defendant challenged the addition of one criminal history point for a prior state misdemeanor conviction—driving under the influence—for which he was fined $250 but not incarcerated. He was not represented by counsel and claimed that use of an uncounseled misdemeanor conviction to increase his guideline sentence violated his Sixth Amendment rights as construed in *Baldasar v. Illinois,* 446 U.S. 222 (1980). The appellate court affirmed, concluding that *Baldasar* limits the use of a prior uncounseled misdemeanor conviction only when it would convert a later misdemeanor into a felony, and thus its use in the criminal history score was proper. *See U.S. v. Nichols,* 979 F.2d 402, 415–18 (6th Cir. 1992).

The Supreme Court affirmed while overruling *Baldasar*. "[A]n uncounseled conviction valid under *Scott [v. Illinois,* 440 U.S. 367 (1979),] may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment. Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction. . . . Today we adhere to *Scott v. Illinois, supra,* and overrule *Baldasar*. Accordingly we hold, consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."

Nichols v. U.S., 114 S. Ct. 1921 (1994) (three justices dissented).

Outline at IV.A.5.

CAREER OFFENDER PROVISION

Circuits continue to split on whether career offender guideline covers drug conspiracies. Two circuits recently agreed with *U.S. v. Price,* 990 F.2d 1367 (D.C. Cir. 1993), that § 4B1.1 does not apply to drug conspiracy defendants despite the inclusion of conspiracy as a predicate offense in § 4B1.2, comment. (n.1). The Sentencing Commission "mistakenly interpreted [28 U.S.C. §] 994(h) to include convictions for drug conspiracies. . . . Because the Commission promulgated section 4B1.1 under the authority of 28 U.S.C. § 994(h), it is invalid to the extent that its scope exceeds the reach of that section of the statute. The guideline should not have been applied to the [drug conspiracy] defendants herein." *U.S. v. Bellazerius,* No. 93-3157 (5th Cir. June 17, 1994) (Politz, C.J.) (remanded). *See also U.S. v. Mendoza-Figueroa,* No. 93-2867 (8th Cir. June 27, 1994) (Gibson, Sr. J.) (remanded: "There is no indication that the Commission intended to rely on its discretionary authority under section 994(a) to extend the section 994(h) mandate. Rather, it is evident that the Commission simply exceeded the language of section 994(h).") (Bartlett, Dist. J., dissented).

Conversely, three circuits recently disagreed with *Price* and agreed with *U.S. v. Heim,* 15 F.3d 830 (9th Cir. 1994), that the Commission had the authority to include conspiracy pursuant to its general authority under 28 U.S.C. § 994(a). *See U.S. v. Damerville,* No. 93-3235 (7th Cir. June 14, 1994) (Pell, J.) (affirmed: "Commission properly exercised its authority in including conspiracy to violate [21 U.S.C.] § 841 among the [controlled substance] offenses that qualify a defendant for career offender status"); *U.S. v. Hightower,* No. 93-5117 (3d Cir. May 31, 1994) (Nygaard, J.) (affirmed: "Reference in the commentary to § 994(h) as a specific source of authority does not preclude the authority of § 994(a). . . . [T]he commentary's expansion of the definition of a controlled substance offense to include inchoate offenses is not 'inconsistent with, or a plainly erroneous reading of' section 4B1.2(2) . . . [and] it does not 'violate[ ] the Constitution or a federal statute'"); *U.S. v. Allen,* No. 92-1225 (10th Cir. May 5, 1994) (Seymour, J.) (affirmed: "Commission could rely on the broader language of section 994(a) . . . to include conspiracy-related offenses in the career offender guideline").

See *Outline* at IV.B.2 and summary of *Heim* in 6 *GSU* #11.

ARMED CAREER CRIMINAL

U.S. v. Oliver, 20 F.3d 415 (11th Cir. 1994) (Remanded: "[P]ossession of a firearm by a convicted felon does not constitute a 'violent felony' within the meaning of [18 U.S.C.] § 924(e), and thus cannot be considered a predicate prior conviction for purposes of sentence enhancement under § 4B1.4." Although, as § 4B1.4, comment. (n.1) states, the definition of "violent felony" in § 924(e) is "not identical to the definition of 'crime of violence'" in § 4B1.1, "we conclude that the two expressions are not conceptually distinguishable for purposes of the narrow question raised in this appeal." Under § 4B1.2, comment. (n.2), "crime of violence" does not include possession of a firearm by a felon, and "[i]t is reasonable to suggest that conduct which does not pose a 'serious potential risk of physical injury to another' for purposes of §§ 4B1.1 and 4B1.2 similarly cannot pose such a risk with respect to § 924(e) and § 4B1.4.").

Outline at IV.D.

Offense Conduct

MANDATORY MINIMUM SENTENCES

U.S. v. Rodriguez-Sanchez, No. 93-50198 (9th Cir. May 3, 1994) (Reed, Sr. Dist. J.) (Remanded: In determining drug amounts for mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A) for defendant convicted of possessing methamphetamine with intent to distribute, § 841(a)(1), district

court may not include amounts possessed for personal use, only the amount defendant intended to distribute. In *U.S. v. Kipp,* 10 F.3d 1463, 1465–66 (9th Cir. 1993), the court held that, under the Guidelines, "[d]rugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not 'part of the same course of conduct' or 'common scheme' as drugs intended for distribution." The court here stated that, "[a]lthough the specific holding of *Kipp* is not technically binding upon us, the principle behind that decision guides our decision. We are dealing with the same crime, possession with intent to distribute. The legislative intent behind the mandatory minimum sentencing provisions of § 841(b) are not necessarily identical with those behind the Sentencing Guidelines but they are similar. . . . [Section] 841(a)(1) does not criminalize mere possession of drugs, only possession with intent to distribute. . . . Other statutes deal with the crime of possession. . . . Thus, the crime of possession with intent to distribute focuses on the intent to distribute, not the simple possession.").

See *Outline* at II.A.1 and 3.

Departures

Substantial Assistance

U.S. v. Martin, No. 93-6477 (4th Cir. May 25, 1994) (Hamilton, J.) (Remanded: "[I]f at the time of sentencing, the government deems the defendant's assistance substantial, the government cannot defer its decision to make a U.S.S.G. § 5K1.1 motion on the ground that it will make a Fed. R. Crim. P. 35(b) motion after sentencing. Instead, the government at that time must determine—yes or no—whether it will make a U.S.S.G. § 5K1.1 motion. If the government defers making a U.S.S.G. § 5K1.1 motion on the premise that it will make a [Rule] 35(b) motion after sentencing, the sentence that follows deprives a defendant of due process, and is therefore 'in violation of law.'" *Accord U.S. v. Drown,* 942 F.2d 55, 58–60 (1st Cir. 1991). The remedy for such a violation is normally a remand to give the government "the opportunity to consider afresh the substantiality of the defendant's assistance at the time of sentencing." Here, however, during the sentencing hearing the government agreed defendant had rendered substantial assistance and effectively promised to make a substantial assistance motion "within the next year," which was "tantamount to and the equivalent of a modification of the plea agreement." On remand, then, defendant "is entitled to specific performance of the government's promise to reward him for his presentence substantial assistance." Note that the government did make a Rule 35(b) motion within a year, but the district court ruled that under the terms of Rule 35(b) it had no power to grant the motion because defendant did not actually provide any *post*-sentencing assistance.).

Outline at VII.F.1.b.ii, 3, and 4.

Criminal History

U.S. v. Rosogie, 21 F.3d 632 (5th Cir. 1994) (Affirmed: Extent of upward departure for defendant in criminal history category VI was proper. The court departed from defendant's offense level 12 and 23 criminal history points, a guideline range of 30–37 months, "by adding one offense level for each criminal history point above the thirteen points required to reach category VI, and assessing four additional levels for [other] reasons." The appellate court found that the reasons for departure "are adequate and the extent of departure is reasonable and not an abuse of discretion.").

Outline at VI.A.4.

Mitigating Circumstances

U.S. v. Pacheco-Osuna, No. 93-50199 (9th Cir. May 2, 1994) (Remanded: It was error to depart downward for immigration defendant because his arrest might have been invalid. Although defendant did not challenge his arrest, the district court found "he may have been stopped because he was Mexican looking, rather than [for] good cause." The appellate court held that whether defendant's arrest was illegal was "a factor entirely unrelated to [his] crime (entry after deportation) or to his criminal history . . . . Even if the stop . . . had not been proper, that was not related to his culpability or to the severity of his offense. Sentencing is not designed to punish, deter or educate errant government officials.").

Outline at VI.C.4.b.

U.S. v. Haversat, 22 F.3d 790 (8th Cir. 1994) (Remanded: Downward departure for antitrust defendant was proper for "truly exceptional family circumstances." Defendant's wife "suffered severe psychiatric problems, which have been potentially life threatening," his presence was crucial to her treatment, and there was testimony that even a short separation could threaten her health. *Accord U.S. v. Gaskill,* 991 F.2d 82, 84–86 (3d Cir. 1993). However, the court abused its discretion by departing five levels and declining to impose any kind of confinement or even probation, imposing only a fine. The court should "craft a sentence that imposes some form of confinement to meet the expressed goal of § 2R1.1 and that still takes into consideration [defendant's] need to be available to render care to his wife," such as intermittent confinement or home detention.).

Outline at VI.C.1.a.

General Application Principles

Relevant Conduct—Other Issues

U.S. v. Rosogie, 21 F.3d 632 (5th Cir. 1994) (Affirmed: "Appellant argues that the district court erred in including a stolen U.S. Treasury check . . . as relevant conduct under § 1B1.3(a)(1)(A) and (B) . . . . Appellant argues that because the check is the basis of a pending state prosecution against him, it should not be included as relevant conduct in the current federal proceeding. We disagree. . . . The Second Circuit has considered the issue . . . and has ruled that information from a pending state prosecution on a related offense may be used as relevant conduct. *U.S. v. Caceda,* 990 F.2d 707, 709 (2d Cir. 1993). We agree.").

Outline at I.A.4.

Adjustments

Acceptance of Responsibility

U.S. v. Colussi, 22 F.3d 218 (9th Cir. 1994) (Remanded: Agreeing with *U.S. v. Tello,* 9 F.3d 1119 (5th Cir. 1993), that if a defendant meets the test for the extra one-level reduction under § 3E1.1(b), it must be granted: "The language mandates a one point reduction where the requirements of § 3E1.1(b) are met." Here, defendant satisfied the first two parts of the test, but the district court apparently "believed it had discretion whether to consider th[e] third step. This was error.").

Outline at III.E.5.